



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 24, 1995

Ms. Raenell Silcox  
Attorney  
Resource Protection Division  
Texas Parks and Wildlife Department  
4200 Smith School Road  
Austin, Texas 78744

OR95-672

Dear Ms. Silcox:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32261.

The Texas Parks and Wildlife Department (the "department") received a request for all records "concerning the San Jacinto River flood and subsequent pipeline releases, which occurred in October 1994." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

We begin by observing that pursuant to section 40.107(c)(4), (5) of the Natural Resources Code, the department has adopted rules that affect the public's right to review certain information pertaining to the cleanup of pollution from oil spills. Generally, these rules require the state trustees to provide the public with an opportunity to review certain information and comment at certain stages in the process of assessing natural resource damage resulting from an oil spill. See 31 T.A.C. §§ 20.22(1) (requiring trustees to provide opportunity for public review and comment on assessment plans, restoration plans, and settlement agreements), .36(e)(1) (requiring trustees to submit a restoration project for public review and comment), .42(b) (requiring public review and comment of final settlement agreement between trustees and responsible person), .44(b) (prohibiting trustees from executing any document which relieves responsible person from liability for

natural resource damages until public has had opportunity to review and comment on document), .44(c) (requiring trustees to provide opportunity for public review and comment when trustees select assessment procedures and protocols for negotiated, expedited or comprehensive assessment, when restoration plan is proposed, and prior to certification of completion of restoration plan), .44(d) (requiring trustees to invite members of public to participate in development and design of equivalent resource plan, and allowing member of public to request a hearing on said plan), and .44(e) (permitting trustees to invite public to participate in determining whether assessment is necessary).

We believe that these rules control access to particular information pertaining to the oil spill. The rules require, and in some cases permit, public review of certain information, including an equivalent resource plan, an assessment plan, a restoration plan, settlement agreements, restoration projects, and any document that relieves the responsible party from liability. The department may not invoke a discretionary exception in the Open Records Act as authority to withhold such information from required public disclosure.

As for the information for which the department's rules do not provide a right of public access, we will consider the exceptions you raise. Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991).

The Governor of Texas designated the department as one of the trustees for the state's natural resources pursuant to the Oil Spill Prevention and Response Act, chapter 40 of the Natural Resources Code.<sup>1</sup> As a trustee, the department may bring a court action to recover natural resource damages sustained as the result of an unauthorized

---

<sup>1</sup>The state trustees for natural resources also include the Texas Natural Resource Conservation Commission and the Texas General Land Office.

discharge of oil. *See* Nat. Res. Code § 40.107; 31 T.A.C. § 20.41. You inform us that the trustee agencies have a claim for natural resource damages from the petroleum spills that occurred in the area of the San Jacinto River on or about October 20, 1994.

We believe that the requested information relates to settlement negotiations or reasonably anticipated litigation to which the department is or may be a party. We therefore conclude that the department may withhold the requested information based on section 552.103 of the Government Code, with the exceptions noted below.

As mentioned above, the department may not withhold from disclosure information that is public by department rule. In addition, we do not agree that the protection of section 552.103 extends to any documents the responsible parties, their consultant, ENTRIX, Inc., or both have seen or had access to. When the opposing parties in anticipated litigation have seen or had access to requested information, there is no justification for withholding that information from the public pursuant to section 552.103(a). Open Records Decision Nos. 597 (1991), 349 (1982). Therefore, the department may not withhold based on section 552.103 any of the information that the responsible parties, their consultant, or both have had access to. We have marked as an example certain documents with a yellow tab. Those documents appear to have been disclosed to the responsible parties, their consultant, or both. These are the types of documents that may not be withheld under section 552.103.

Based on section 552.103 of the Government Code, you may also withhold the handwritten comments on documents if the handwritten comments were not disclosed to the responsible parties, their consultant, or both. We note that the applicability of section 552.103(a) ends once the settlement agreement is reached or the litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>2</sup>

As we have determined that section 552.103 does not apply to the information that the opposing party has had access to, we must determine whether that information is excepted from disclosure by the other exception you raise, section 552.111 of the Government Code. We conclude that this exception does not apply to the information at issue.

Section 552.111 excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.


---

<sup>2</sup>You claim that section 552.107 applies to one document submitted to this office. As we have concluded that the department may withhold that document under section 552.103(a), we need not address your section 552.107 claim.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). Generally, section 552.111 does not apply to information submitted to a governmental body by an outside party. *But see* Open Records Decision No. 631 (1995) (applying § 552.111 to information created for governmental body by outside consultant when consultant is acting at request of governmental body and performing task within authority of governmental body). In addition, section 552.111 is waived by the release of information to the public. *See* Open Records Decision No. 435 (1986). Thus, the department may not withhold any of the information that was previously disclosed to the responsible parties, their consultant, or both under section 552.111 of the Government Code.<sup>3</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Government Section

SES/KHG/rho

Ref.: ID# 32261

Enclosures: Marked documents

---

<sup>3</sup>Although you claim that section 552.101 applies to except the requested information from disclosure, you do not explain how section 552.101 applies to any specific information. The Government Code places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). However, as section 552.101 is a mandatory exception, we have reviewed the documents to ascertain whether any of the submitted information is confidential either by statute, by judicial decision, or under constitutional or common-law privacy. We conclude that there is no confidential information or information protected by constitutional or common-law privacy in the submitted documents. Therefore, section 552.101 does not except the requested information from required public disclosure.

cc: Mr. Ronald White  
Environmental Consulting  
667 East Kitchen Drive  
Port Neches, Texas 77651  
(w/o enclosures)